

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MATTHEW J. RYAN	:	ORDER
	:	DTA NO. 830219
for Redetermination of Deficiencies or for Refund of Personal	:	
Income Tax under Article 22 of the Tax Law for the Years	:	
2000 and 2009.	:	

Petitioner, Matthew J. Ryan, filed a petition for redetermination of deficiencies or for refund of personal income tax under article 22 of the Tax Law for the years 2000 and 2009.

Petitioner, appearing pro se, brought a motion, dated April 4, 2022, for reconsideration for granting an amended answer and for a judgment dismissing all claims of the Division of Taxation. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel), filed its opposition to petitioner’s motion on April 28, 2022.

In addition, the Division of Taxation brought a cross-motion, dated April 28, 2022, seeking dismissal or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner filed his opposition to the Division of Taxation’s motion on May 9, 2022.¹ The 90-day period for issuance of this order commenced on May 31, 2022. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and

¹ On this date, petitioner also filed a reply to the Division of Taxation’s opposition to his motion for reconsideration for granting amended answer and for a judgment dismissing all claims. Replies to responses to motions will not be entertained, however, without permission of the administrative law judge or secretary to the Tax Appeals Tribunal (20 NYCRR 3000.5 [b]). Such permission for a reply was never given. Consequently, petitioner’s reply to the Division’s opposition to his motion has not been considered.

documents submitted in connection with this matter, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following order.

ISSUES

- I. Whether the Division of Taxation was properly granted leave to file an amended answer.
- II. Whether petitioner is entitled to summary determination in his favor.
- III. Whether the Division of Taxation is entitled to dismissal or, alternatively, summary determination in its favor.

FINDINGS OF FACT

1. Petitioner, Matthew J. Ryan, filed a timely petition with the Division of Tax Appeals on December 31, 2020, challenging a conciliation order dismissing request dated December 11, 2020 (conciliation order).² The conciliation order, which was attached to the petition, references notice and demand number L-020421479, for tax year 2000, and notice of deficiency and notice and demand number L-041800571, for tax year 2009.

2. Petitioner filed a New York State resident income tax return, form IT-201, for the tax year 2000, jointly with his then-spouse, EC Ryan. Petitioner, however, failed to remit the self-assessed tax computed as due. As a result, the Division of Taxation (Division) issued notice and demand L-020421479, dated December 31, 2001, asserting that petitioner owed \$9,411.00 in tax plus interest and penalties for the tax year 2000. It does not appear that the Division issued a notice of deficiency to petitioner for the tax year 2000.

² Petitioner actually simultaneously filed two separate petitions, one for the tax year 2000 and the other for the tax year 2009, both challenging the same conciliation order. The two petitions were consolidated into the instant matter.

3. On January 10, 2013, EC Ryan was granted innocent spouse relief for the liabilities arising from notice and demand L-020421479.

4. Also attached to the petition was a tax warrant, ID number E-009532595-W004-7 (Warrant), for Matthew J. Ryan and/or E Colleen Ryan. Listed on the warrant was assessment number L-020421479.

5. The Division issued to petitioner notice of deficiency number L-041800571, dated January 14, 2015, asserting tax in the amount of \$5,683.00 plus interest and penalties for the tax year 2009. The Division asserts that the basis for this notice was petitioner's failure to file the requisite personal income tax return or pay the proper tax due for the year 2009.

6. The Division issued to petitioner notice and demand number L-041800571, for tax year 2009, on May 1, 2015.

7. Petitioner disputes that he failed to file a return or remit the proper amount of tax for the year 2009.

8. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on September 30, 2020, seeking review of the notices for the tax years 2000 and 2009.

9. On December 11, 2020, BCMS issued its conciliation order dismissing request. The conciliation order determined that petitioner's protest of notices numbered L-020421479 and L-041800571 were untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on June 1, 2015 and April 15, 2002, but the request was not mailed until September 30, 2020, or in excess of 90 days, the request is late filed.”

10. In response to the petition that was filed on December 31, 2020 (*see* finding of fact 1), the Division filed its answer on April 14, 2021.

11. Petitioner filed a reply to the Division's answer on April 28, 2021.

12. On March 1, 2022, the Division sought leave to amend its answer by letter to the supervising administrative law judge, pursuant to 20 NYCRR 3000.4 (d). A copy of this request was sent to petitioner by certified mail. By letter of March 4, 2022, leave was granted by the supervising administrative law judge.

PETITIONER'S MOTION FOR RECONSIDERATION

13. Petitioner filed a motion, dated April 1, 2022, requesting reconsideration of the granting of leave for the Division to amend its answer. In support of his motion, petitioner attached a letter from the Petition Intake Unit of the Division of Tax Appeals, dated October 7, 2021, informing him that an assignment of his case to an administrative law judge would take approximately 14 months. He argues that the described delay did not occur. He further asserts that he was not informed of the appointment of a presiding judge prior to the granting of the Division's request for leave to amend its answer and was not permitted an opportunity to respond. As a result, according to petitioner, he was caused harm, his rights were violated, and the amended answer should be nullified.

14. As part of his motion, petitioner also requests that he be granted "a Summary Judgement" based on the Division's failure to timely respond to his April 28, 2021 reply. Petitioner did not attach an affidavit to his motion.

15. Petitioner requests that if his motion for reconsideration is denied, he be permitted a 10-month extension in which to reply to the Division's amended answer.

16. The Division opposes petitioner's motion, first arguing that the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) do not provide for a motion to reconsider the admittance of an amended answer. Additionally, the Division states that to the extent petitioner

has made a motion for summary determination, he failed to provide the necessary supporting affidavit or identify all material facts.

THE DIVISION'S CROSS-MOTION FOR SUMMARY DETERMINATION

17. The Division made a cross-motion to dismiss or for summary determination along with its opposition to petitioner's motion. It argues that the Division of Tax Appeals lacks subject matter jurisdiction over the petition with regard to the tax year 2000. Additionally, the Division argues that the pleadings fail to state a claim for relief for the tax year 2009.

18. The Division did not offer proof of mailing of notice of deficiency number L-041800571, for the year 2009, with its cross-motion.

19. Petitioner offered his affirmation in response to the Division's cross-motion. He states that the Division and EC Ryan failed to provide due diligence and committed fraud in granting EC Ryan innocent spouse relief for their joint liability for the tax year 2000. Further, he disputes the Division's assertion of non-filing and non-payment regarding the 2009 tax year.

CONCLUSIONS OF LAW

A. The first issue to be addressed is petitioner's motion for "reconsideration for granting amended answer." Although there is no specific provision in the Rules for this motion, it will be treated as filed under the general motion provisions of 20 NYCRR 3000.5. Petitioner seeks to reverse the decision of the supervising administrative law judge granting the Division permission to amend its answer. In support of his position, petitioner argues that his rights to defend himself have been violated.

Here, the Division correctly requested consent of the supervising administrative law judge pursuant to 20 NYCRR 3000.4 (d) (1). Consistent with that provision, the supervising administrative law judge granted the Division's request. Such "leave shall be freely given upon

such terms as may be just . . . ” (*id.*). Petitioner did not demonstrate any actual prejudice arising from leave being granted. As a result, petitioner’s request for reconsideration is denied.

Further, petitioner’s request for a 10-month extension to respond to the Division’s amended answer is likewise denied. 20 NYCRR 3000.4 (d) (1) allows for a reply to an amended answer within 20 days. Petitioner was served with a copy of the proposed amended answer by certified mail on March 1, 2022, and with the supervising administrative law judge’s letter granting leave on March 4, 2022. Instead of filing a reply, or seeking an extension of time, however, he chose to file the instant motion. Additionally, the motion itself cannot constitute a timely reply as it was filed after the 20-day deadline. Thus, petitioner failed to exercise his right to file a formal reply under 20 NYCRR 3000.4.

B. Petitioner also seeks “summary judgement” based on the Division’s delay in filing its amended answer. This request will be deemed as petitioner’s motion for summary determination. 20 NYCRR 3000.9 (d) (1) states that a motion for summary determination “shall be supported by an affidavit” Petitioner’s filing lacks the requisite affidavit. Consequently, petitioner’s motion for summary determination is denied.

C. Meanwhile, the Division filed a cross-motion to dismiss or for summary determination. Regarding the Division’s motion to dismiss the petition, 20 NYCRR 3000.9, provides, in pertinent part:

“(a) Motion to dismiss. (1) Grounds. A party may move to dismiss a petition on the grounds that:

(ii) the division of tax appeals lacks jurisdiction of the subject matter of the petition;

* * *

(vi) the pleading fails to state a cause for relief;” (emphasis as in original).

A motion for summary determination “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

D. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). “If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts,” then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

The focus of the Division’s motion is the notices that were the subject of the December 11, 2020 conciliation order dismissing request: notice and demand number L-020421479 (for tax year 2000) and notice of deficiency number L-041800571 (for tax year 2009).

Notice and Demand L-020421479 (Tax Year 2000)

E. The first notice addressed by the conciliation order and challenged by the petition is notice and demand L-020421479, for the tax year 2000. A notice and demand, such as the one here, does not give rise to hearing rights before the Division of Tax Appeals (*see* Tax Law §§ 173-a [2]; 2000; *Matter of Alesi*, Tax Appeals Tribunal, June 9, 2022). Thus, the Division's motion is granted as to notice and demand L-020421479 and petitioner's protest of that notice is dismissed.

Notice of Deficiency L-041800571 (Tax Year 2009)

F. The second notice addressed by the conciliation order and challenged by the petition is notice of deficiency number L-041800571, for the tax year 2009. The conciliation order dismissed the request as untimely. A notice of deficiency may be protested by timely filing a petition with the Division of Tax Appeals or request for a conciliation conference with BCMS (Tax Law §§ 170 [3-a]; 689 [b]). A petition or request for a conciliation conference must be timely filed to confer jurisdiction on the Division of Tax Appeals to consider the merits of the protest (*see e.g. Matter of Vargas*, Tax Appeals Tribunal, November 18, 2021; Tax Law § 2006 [4]). Where the timeliness of a taxpayer's request for a conciliation conference or petition is in question following the issuance of a notice of deficiency, the Division has the burden to prove the date and fact of mailing of the notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by "producing affidavits from

individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)” (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

G. Here, the Division has not introduced proof sufficient to establish the mailing of the notice to petitioner’s last known address on January 14, 2015. Indeed, the Division has failed to present the requisite certified mail log, affidavits, and other evidence needed to prove the date of mailing of the notice of deficiency. Consequently, the Division has not established under the applicable standard that petitioner filed his request for a conciliation conference after the period for doing so had expired. As the instant petition was timely filed after the issuance of the conciliation order, it is not time-barred for the notice of deficiency for the tax year 2009.

H. Finally, the Division argues that summary determination is warranted with regard to notice number L-041800571 as petitioner failed to state a cause for relief. Although it is difficult to ascertain many of the arguments made by petitioner, one thing is clear – he disputes the substance of the statutory notice. He disputes the Division’s assertion of non-filing and the amount of tax owed. If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94 [1968]; *Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). As there appears to be the existence of material issues, and the Division has not demonstrated that the notice is time-barred based on the motion papers, its cross-motion for summary determination concerning notice of deficiency number L-041800571 is denied.

I. Petitioner’s motions for reconsideration of granting leave for the Division of Taxation to amend its answer and for summary determination are denied. The Division of Taxation’s cross-motion to dismiss is granted with regard to notice and demand L-020421479 and the

conciliation order dated December 11, 2020 is sustained for that notice. The Division of Taxation's cross-motion for summary determination is denied without prejudice with regard to notice of deficiency L-041800571, and this matter will be scheduled for hearing in due course concerning that notice.

DATED: Albany, New York
August 25, 2022

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE